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Issue Date: 21 April 2006

Case No: 2006-LDA-00015
OWCP No. 02-135370

In the Matter of:

PATRICIA IRBY, (ON BEHALF OF KELSEY HELVENSTON AND KYLE HELVENSTON, CHILDREN OF SCOTT HELVENSTON (DECEASED),
Claimant,
vs.

BLACKWATER SECURITY CONSULTING, LLC,
Employer,
and

FIDELITY AND CASUALTY COMPANY OF NEW YORK/ CNA INTERNATIONAL,
Insurance Carrier.

Order Denying Claimant's Motion Withdraw Claim

Scott Helvenston and others died in an ambush in Fallujah, Iraq on March 31, 2004. Blackwater Security and its insurance carrier, Fidelity and Casualty Co. of New York/CNA International (Employer and Carrier respectively, or the Respondents jointly), accepted the claim for death benefits filed on behalf of his two children[1] under the Defense Base Act[2] (Act) in April 2004. The children have received the maximum statutory weekly compensation benefits.[3] The motion filed to withdraw the claim is denied because it lacks adequate proof of two elements the regulation requires: that the withdrawal be in the best interest of the decedent's children and have a proper purpose.

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[1] Their mother, Patricia Irby, and the decedent had been divorced, so she has no claim of her own to any Defense Base Act benefits. As the Claimant she acts in a fiduciary capacity on her minor children's behalf.

[2] Act of Aug. 16, 1941, c. 357, §1, 55 Stat. 622, codified as amended at 42 U.S.C.A. § 1651 *et seq.* (West 2003). An extension of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901*, et seq*. (West 2001)] the Defense Base Act incorporates most (but not all) provisions of Longshore Act. *Pearce v. Director, O.W.C.P.,* 603 F.2d 763, 768 (9th Cir. 1979).

[3] From April 2004 to Sept. 30, 2004 the maximum weekly rate was $1,030.78. From Oct. 1, 2004 to Sept. 30, 2005 it was $1,047.17; since Oct 1, 2005 the rate has been $1,073.64. See http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm

Procedurally this case is unusual. The Claimant sought the death benefits, but has resisted the entry of a compensation order because it would preclude the wrongful death action filed in North Carolina against the Employer[4] by an ancillary administrator of the decedent's estate. The Respondents, not the Claimant, filed the form LS-18 to bring the matter to the Office of Administrative Law Judges when the Claimant would not agree that the District Director could enter a compensation order.[5] The matter had to be sent here. *Ingalls Shipbuilding Inc., v. O.W.C.P.,* 102 F.3d 1385, 1389 (5th Cir. 1996). The Respondents filed a Confession to Entry of a Compensation Order. To avoid making a significant ruling on a one-sided presentation, they were required to file a motion for summary adjudication.[6]

The Carrier will use the compensation order to obtain reimbursement from the federal government of the ongoing death benefits that now exceed $100,000, augmented by 15% as "necessary claims expense[s]," plus its attorney's fees for administering the death benefits claim. *See* § 104(a)(3) of the War Hazards Compensation Act[7] and its implementing regulations at 20 C.F.R. § 61.104(b) & (c) (2005). A compensation order constitutes "prima facie" evidence "of the right of the beneficiary to the payment awarded" when submitted with a reimbursement request.[8] 20 C.F.R. § 61.102(c) (2005). The Employer will use the compensation order as a defense to the wrongful action under the "exclusive remedy" provision of the Defense Base Act. *See*, 42 U.S.C.A. § 1651(c).[9] The interests of the Carrier and Employer differ enough that they are separately represented, but both seek a compensation order.

The Claimant was granted additional time to oppose the Respondents' summary decision motion, to complete discovery on the issues it raised. Shortly before the extension expired, the Claimant asked for clarification of a ruling she regarded as detrimental to her position on summary adjudication.[10] Rather than answer the Respondents' potentially dispositive motion, she filed this request to withdraw the claim without prejudice, under 20 C.F.R. §702.225.[11]

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[4] CNA is not Blackwater's general liability insurer, and is not a party to or directly affected by the outcome of the wrongful death action.

[5] The form LS-18 was filed with the District Director on Oct. 18, 2005.

[6] 20 C.F.R. §§ 18.40 and 18.41 (2005).

[7] 42 U.S.C.A. § 1701 *et seq*. (West 2005).

[8] 20 C.F.R. § 61.101(c)(4) (2005).

[9] That subsection reads: "(c) Liability as exclusive. The liability of an employer, contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) under this chapter shall be exclusive and in place of all other liability of such employer, contractor, subcontractor, or subordinate contractor to his employees (and their dependents) coming within the purview of this chapter, under the workmen's compensation law of any State, Territory, or other jurisdiction, irrespective of the place where the contract of hire of any such employee may have been made or entered into."

[10] *See* the letter of March 30, 2006 from Claimant's counsel at pg. 3.

[11] § 702.225 Withdrawal of a claim. (a) *Before adjudication of claim.* A claimant (or an individual who is authorized to execute a claim on his behalf) may withdraw his previously filed claim: Provided, That:

A. The Alleged Conflict of Interest

A threshold issue is the conflict of interest the Respondents claim the Claimant's lawyers have. The Ninth Circuit expects administrative law judges to disqualify any lawyer who breaches the duty of undivided loyalty to the client. *Smiley v. Director, OWCP,* 984 F.2d 278 (9th Cir. 1993). The outcome of the conflict issue also bears on whether this withdrawal "is in the claimant's best interest." 20 C.F.R. §702.225(a)(3).

No conflict inheres in a withdrawal of this claim. At first glance one seems to be present, because the Claimant's counsel also represents Richard P. Nordan, the ancillary administrator who is the plaintiff in the North Carolina wrongful death action. If the children are entitled to the death benefits under the Defense Base Act, the wrongful death action is barred by its exclusive remedy provision. 42 U.S.C.A. § 1651(c). Judicial interpretations of North Carolina law scotch any conflict. A wrongful death action may be filed by an administrator of the decedent's estate, but the real parties in interest are those who take under the state's Intestate Succession Act,[12] who will receive any damages awarded. *Bowen v. Constructors Equipment Rental Co.,* 283 N.C. 395, 196 S.E.2d 789 (1973). Wrongful death damages are exempt from the claims of the estate's creditors. *In re Estate of Parrish*, 143 N.C. App. 244, 547 S.E.2d 74, 82 (N.C. App. 2001).

The children are the decedent's only beneficiaries under the Defense Base Act, North Carolina's wrongful death statute[13] and its Intestate Succession Act. Their mother, who filed the Defense Base Act claim on their behalf, recovers nothing herself under either statute, so she has no conflict acting in her fiduciary role as their decision maker. She gave her lawyers a written

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(1) He files with the district director with whom the claim was filed a written request stating the reasons for withdrawal;

(2) The claimant is alive at the time his request for withdrawal is filed;

(3) The district director approves the request for withdrawal as being for a proper purpose and in the claimant's best interest; and

(4) The request for withdrawal is filed, on or before the date the OWCP makes a determination on the claim.

(b) *After adjudication of claim.* A claim for benefits may be withdrawn by a written request filed after the date the OWCP makes a determination on the claim: Provided, That:

(1) The conditions enumerated in paragraphs (a) (1) through (3) of this section are met; and

(2) There is repayment of the amount of benefits previously paid because of the claim that is being withdrawn or it can be established to the satisfaction of the Office that repayment of any such amount is assured.

(c) *Effect of withdrawal of claim.* Where a request for withdrawal of a claim is filed and such request for withdrawal is approved, such withdrawal shall be without prejudice to the filing of another claim, subject to the time limitation provisions of section 13 of the Act and of the regulations in this part.

[12] N.C. Gen. Stat. §§ 29-15(2) and 29-16(a)(1).

[13] N.C. Gen. Stat. § 28A-18-2.

authorization to withdrawal this claim.[14]

A contingency fee agreement in the wrongful death action serves as a litigation financing device that aligns the lawyer's interests (although imperfectly) with the client's through incentives, for the lawyer earns nothing unless the client recovers. *Kirchoff v. Flynn*, 786 F.2d 320, 324-325 (7th Cir. 1986). Ethics principles do not preclude the withdrawal due to divided loyalties of the lawyers who simultaneously represent the Claimant here and the ancillary administrator in the North Carolina wrongful death action.

B. Estoppel

The Respondents argued earlier that the Claimant should withdraw this Defense Base Act claim if she wants to pursue the wrongful death action in North Carolina. The Claimant says they are estopped from challenging the withdrawal they advocated. Not so. Judicial estoppel comes into play when an opponent prevails on an argument. *Rissetto v. Plumbers And Steamfitters Local 343,* 94 F.3d 597, 604 (9th Cir. 1996). I never adopted the Respondents' position. They are no more prohibited from advancing inconsistent arguments than the Claimant has been throughout this litigation.

C. The Standards for Withdrawal in Regulation

Withdrawal is a creature of the Longshore regulations, not the Act. *Gutierrez v. Metropolitan Stevedore Co.,* 18 BRBS 62, 63 (1986). The withdrawal regulation focuses on the OWCP, without mention or acknowledgment of the administrative law judge level of adjudication.

1. Benefit repayment

Whether the Claimant must repay the benefits received affects the "best interest" and "proper purpose" analyses that follow. The parties have treated this as a withdrawal under 20 C.F.R. § 702.225(a). The distinction between subsections (a) and (b), according to their catchlines, has to do with "adjudication." "[R]epayment of the amount of benefits previously paid" is required for withdrawals after adjudication. 20 C.F.R. §702.225(b)(2). The actual text of the regulation, however, distinguishes between withdrawals that come before or after "the date the OWCP makes a determination on the claim." 20 C.F.R. §§702.225(a)(4), 702.225(b). Neither distinction makes good sense because the OWCP, acting through the District Director, adjudicates no claims. That function is assigned exclusively to administrative law judges. See § 19(d) of the Longshore Act, 33 U.S.C.A. § 919(d); House Report No. 82-1441, 1972 U.S. Code Cong. & Adm. News 4708. The U.S. Supreme Court has summarized the process this way:

> The commissioner [i.e., the district director] notifies the employer of the claim, §919(b), at which time the employer might: (i) agree to pay the amount of benefits fixed by the Act, 20 CFR § 702.231

[14] The authorization was mentioned in the letter Claimant's counsel served on April 11, 2006. A redacted version of her instructions to counsel was filed on April 19, 2006, after I requested a copy of it for the record.

> *et seq.* (1996) (procedures for payment of noncontroverted claims); (ii) enter into a formal settlement with the person seeking compensation for a (presumably) lesser amount, subject to the approval of the deputy commissioner or an ALJ, 33 U.S.C. § 908(i); 20 CFR § 702.241 *et seq.* (1996); or (iii) give notice that it is denying liability for, or controverting, the claim, §702.251. If the employer controverts the claim, the deputy commissioner is empowered to attempt to resolve the parties' dispute informally. §702.311 *et seq.* Should informal discussions prove unsuccessful, the commissioner refers the matter to an ALJ and a formal hearing is held. 33 U.S.C. §§ 919(c)-(d); 20 CFR § 702.316 (1996).
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> *Ingalls Shipbuilding v. Director, O.W.C.P. (Yates),* 519 U.S. 248 (1997).

The "determination" in §702.225(a)(4) may be the recommendation at the end of the informal conference(s) that completes the District Director's role in a claim. 20 C.F.R. § 702.316. Any later withdrawal seemingly requires a repayment of benefits.

Reading the "determination" instead as the completion of formal APA proceedings makes no sense. That interpretation shifts the actor (from the OWCP District Director to the administrative law judge), the action (from the District Director's suggested disposition to the administrative law judge's decision) and triggers reimbursement only when the issue of liability has been decided. There are few reasons (if any) for a claimant to withdraw a claim that succeeds at trial, and none to withdraw one that fails if it sparks a liability to repay benefits. Workers who lose their claims at trial are shielded from repaying compensation an employer or carrier advanced by § 14(j) of the Longshore Act, 33 U.S.C.A. § 914(j) (West 2001).[15] See *Stevedoring Services of Am. v. Eggert*, 953 F.2d 552, 556-557 (9th Cir. 1992). The law gives the employer a credit against any liability for future benefits due for the injury.

Repayment has been effectively read out of the regulation. The Benefits Review Board has confined it to "claims that had been resolved informally" at the OWCP, that the claimant later seeks to abandon. *Graham v. Ingalls Shipbuilding/Litton Systems, Inc.*, 9 BRBS 155, 159 & n. 2 (1978). The Board never explained in that footnote how a claim that fairly could be characterized as "resolved" would come to be withdrawn. This interpretation renders the regulation's repayment provision a dead letter, for a claimant need only refuse to agree to a disposition of the case at the OWCP, bring the matter to the administrative law judge level, and repayment ceases to apply.

This withdrawal regulation needs to be thoroughly re-thought and re-drafted to specifically encompass withdrawal requests filed before administrative law judges.

[15] "(j) If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." This provision was codified as § 14(k) in the 1972 version of the Longshore Act that was in effect when the withdrawal regulation was published in 1973. It became § 14(j) of the current version of the Act in amendments Congress enacted in 1984, Pub. L. No. 98-426, § 13(b); 98 Stat. 1639, 1649.

2. Elements Satisfied.

Several standards in 20 C.F.R. § 702.225(a) are met. The Claimant has filed a written withdrawal request that addresses each required element. The Claimant is alive, whether that means the mother as her children's representative or the children themselves. 20 C.F.R. § 702.225(a)(1) and (2) are satisfied.

3. Elements Requiring Findings.

The two elements in § 702.225(a)(3) require the Claimant to show that the withdrawal is "in the claimant's best interest" and for a "proper purpose." These are separate determinations. *Langley v. Kellers' Peoria Harbor Fleeting,* 27 BRBS 140 (1993). Sometimes they present solely legal issues. A withdrawal in exchange for a sum of money is self-evidently in the claimant's economic interest, but improper as a matter of law if used as an artifice to avoid the judicial review and approval of settlements § 8(i) of the Longshore Act requires. *Rodman v. Bethlehem Steel Corp.,* 16 BRBS 123, 127 & n. 5 (1984). Often facts matter. *Graham v. Ingalls Shipbuilding/Litton Systems, Inc.*, 9 BRBS 155, 160 (1978). The decision of the Fifth Circuit in *Ingalls Shipbuilding Inc., v. O.W.C.P.,* 102 F.3d 1385 (5th Cir. 1996) is suffused with concern that withdrawal motions receive individualized consideration of the facts and the parties' arguments at the trial level. The appellate court refused the invitation to decide the withdrawal issue that never had been presented to an administrative law judge. *Id.* at 1390 & n. 8.

An evaluation should be more searching where the interests of minor children who are receiving substantial benefits are at stake than would be applied to a worker's motion to withdraw an unpaid claim.

4. Best Interest

a) Genesis of the Best Interest Standard

The judge's avuncular role in withdrawals is rooted in the portions of the Longshore Act that require approval of agreed settlements. Congress permitted commutation of future weekly benefit payments to a lump sum in §14(j), when that was "for the best interests of the person entitled to compensation." Act of Mar. 4, 1927, c. 509, §14(j), 44 Stat. 1424, 1433. Congress first authorized parties to settle claims for partial disability when it added § 8(i) to the Longshore Act in 1938. Then "agreed settlements of the interested parties" that discharged the employer's liability for compensation could be approved when it was "for the best interests of an injured employee" to do so. Act of June 25, 1938, c. 685, § 5, 52 Stat. 1164, 1166. Unless a commutation also was approved under §14(j), the partial disability benefits set in the settlement still had to be paid periodically. Congress authorized lump sum settlements in all disability cases in a 1972 amendment to § 8(i). Longshore and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576 § 20(a), 86 Stat. 1251, 1264 (Oct. 27, 1972).

The Department of Labor historically treated withdrawals as if they were settlements in which the worker received no payment. Until 1973 the withdrawal regulation of the Bureau of Employees' Compensation (the predecessor of the current Office of Workers' Compensation

Programs)[16] stated:

> Any claimant not desiring to proceed with a claim filed in case of injury or death pursuant to said Act and the regulations in this subchapter, may apply for withdrawal of the claim to the deputy commissioner with whom filed, stating the reason for such withdrawal. The deputy commissioner whose jurisdiction has been invoked for the filing of such claim shall in consideration of such application determine whether such withdrawal is for a proper purpose and for the claimant's best interest prior to authorizing such withdrawal. Any claim so withdrawn is withdrawn without prejudice to the filing of another claim subject to the provisions relating to the limitation of time in Section 13 of the Act.
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> 20 C.F.R. § 31.7 (1972)

That regulation has much in common with the current 20 C.F.R. § 702.225, although the two are not identical. The regulations were recast after the significant amendments Congress made to the Longshore Act in 1972, when for the first time administrative law judges (then known as hearing examiners) were to adjudicate claims for Longshore benefits in formal hearings under the Administrative Procedure Act. Longshore and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576 § 14, 86 Stat. 1251, 1261 (Oct. 27, 1972), now codified as 33 U.S.C.A. § 919(d). The current version of the withdrawal regulation originally was promulgated in 1973 as 20 C.F.R. §702.216. *See* 38 Fed. Reg. 2650 (Jan. 26, 1973) and 38 Fed. Reg. 26861 (Sept. 26, 1973); it was redesignated to its current codification as 20 C.F.R. § 702.225 at 50 Fed. Reg. 397 (Jan. 3, 1985).

b) Factors in the Best Interest Analysis

The Benefits Review Board requires judges to "inquir[e] fully into the facts" and make "fact findings based on the entire record" when determining whether a withdrawal is in the Claimant's best interest. *Graham v. Ingalls Shipbuilding/Litton Systems, Inc*. 9 BRBS 155, 159-160 (1978). The Board instructed the judge in *Graham* to treat a request for dismissal as a request for withdrawal, and to take evidence on whether the withdrawal was for a proper purpose and in the claimant's best interest, the statutory standard then applicable to §8(i) settlements. The Board anticipated that new regulations would be adopted dealing with the standards judges should apply to withdrawal requests, because the existing regulation only referred to deputy commissioners. *Id.,* 9 BRBS at 159. No new or amended regulations have been promulgated in the intervening 28 years setting withdrawal standards for administrative law judges to apply.

Congress modified § 8(i) again in 1984. Approval no longer hinged on an affirmative finding that a settlement was "for the best interests of the injured employee." Congress conferred greater contractual autonomy on workers and employers by instructing judges and district directors to approve settlements "unless [they were] found to be inadequate or procured by duress." *See* the Longshore and Harbor Worker's Compensation Act Amendments of 1984,

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[16] See the history given in 20 C.F.R. § 701.203 (2005) and in *Jennings v. Lockheed Shipbuilding & Const. Co*., 9 BRBS 212, 214 & n. 1 (1978).

Pub. L. 98-426, § 8(i), 98 Stat. 1639, 1646 (Sept. 28, 1984), codified as 33 U.S.C.A. § 908(i). *Oceanic Butler, Inc. v. Nordahl,* 842 F.2d 773, 776-777 (5th Cir. 1988) emphasized the significant shift this represented. Statutory standards for approval of a settlement and the regulatory standards for approval of a withdrawal diverged after 1984.

It is by no means clear what facts must be weighed today to determine whether a withdrawal is in a claimant's best interest. If the pre-1984 standards for settlement approval continue to apply under *Graham, supra,* 9 BRBS at 159, the factors are the ones identified in *Clefstad v. Perini North River Asso*., 9 BRBS 217 (1978) that bear on disability: the claimant's age, education, work history, medical condition, the availability of work the claimant can do and his "financial circumstances." *Id.,* at 223. Knowing these things the judge could tell whether the proposed settlement took advantage of the claimant, for example by offering a scheduled payment when the claimant's "best interest" would lie in an unscheduled one. *Id.,* at 222. *Clefstad's* settlement guidelines were superseded by regulations that implement the 1984 amendment to §8(i) on settlement approval published in 1985 at 20 C.F.R. §§ 702.241 to 702.243. [17]

Review of the *Clefstad* factors might show the claimant never had a valid claim, so that withdrawal was appropriate. What other practical value disability factors have in deciding whether to approve a withdrawal is a mystery. The one relevant factor undoubtedly is the Claimant's "financial circumstances" *Id.,* at 223. Money is the basis this Claimant has offered to argue that withdrawal is in the children's best interest.

c) The Financial Impact of Withdrawal on the Claimant's Interest

The Claimant says the recovery available in the state court wrongful death action "dwarfs the recovery they would be entitled to in the Department of Labor." Motion to Withdraw at 4-5. She also claims to seek "non-monetary remedies" there: discovery of "the truth about how their loved ones were killed." *Id.,* at 5. Whatever relevant discovery in the wrongful death action may show, the text of the North Carolina wrongful death statute confirms that its purpose is to provide damages, not information. N.C. Gen. Stat. § 28A-18-2. My analysis is limited to the financial aspects of a withdrawal.

To the Respondents, certainty outweighs risk. They conceded liability unconditionally when the claim was presented and have paid the maximum benefit available for two years. The withdrawal would exchange this income stream for a wrongful death action that they allege is:

(a) predicated on questionable assumptions about the extraterritorial reach of the North Carolina statute into a war zone in Iraq,
(b) precluded by the Act's exclusivity provision, something to be decided on the pending motion for summary determination, and
(c) dependent on the ability to prove the Employer's negligence or intentional wrongdoing.

This, the Respondents say, cannot be in the children's interest. The Claimant's counsel can obtain no fee from the Respondents in this forum, because the death benefits have been paid

[17] 50 Fed. Reg. 399 (Jan. 3, 1985), as amended at 51 Fed. Reg. 4284 (Feb. 3, 1986).

voluntarily without controversion. *See* § 28(a) of the Longshore Act, 33 U.S.C.A. §928(a). The Respondents believe lucre has affected the independent professional judgment of the Claimant's lawyers and given rise to a conflict of interest. For the same reasons I rejected the conflict argument at the outset of this analysis, I reject it here too.

The Claimant argues no exchange of remedies is involved — the death benefits claim may be refiled within one year under § 13(a) and (d)[18] of the Longshore Act, 33 U.S.C.A. § 913(d) and 20 C.F.R. § 702.225(c) (2005) should the North Carolina wrongful death action fail. This treats the withdrawal as if it were a stay, making perilous assumptions. That final determination could take more than the year § 13(a)[19] gives a claimant to refile, which begins on the date of the last compensation payment. Thereafter refiling is authorized only if the wrongful death action is defeated because the Defense Base Act provides the exclusive remedy. If "recovery is denied" because North Carolina's courts think its wrongful death statute lacks international scope, or the jury finds no negligence or intentional wrongdoing, the tolling provision in §13(d) does the children no good. The "best interest" standard suggests the conservative approach that views this withdrawal as an exchange. Upon withdrawal the children's payments stop, and no claim remains pending.

Economically no withdrawal is in the "best interest" of these children unless the value of the certain death benefits and the potential recovery in the wrongful death action (net of attorney's fees and costs) are roughly equivalent. Death benefits are payable for the period of the children's minority (*viz.,* 1/2 the maximum weekly benefit times the number of years remaining until each child attains age 18, or age 23 if enrolled in post-secondary education).[20] The lawyers must have calculated these amounts as part of the information presented to the Claimant for her to make an informed decision about whether to withdraw this claim. The Claimant needs to state that value explicitly in the motion papers.

The Claimant then needs to explain her valuation of the net recovery available in the wrongful death case. No meaningful evidence of that value has been offered. Claimant's lawyer's declaration that "we will be asking the jury to award the Claimants tens of million of dollars"[21] widely misses the mark. He can ask for anything, but the children will get only what the facts prove and the law allows. Their cause of action is worth what a flinty-eyed third party would pay to acquire it in an arms' length transaction (*i.e.,* the price a willing seller under no compulsion to sell would strike with a willing buyer under no compulsion to buy, each acting

[18] It says: "(d) Tolling provision. Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this Act and that such employer had secured compensation to such employee under this Act the limitation of time prescribed in subdivision (a) [to file a claim] shall begin to run only from the date of termination of such suit."

[19] The relevant portion says: "If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment."

[20] 33 U.S.C.A. § 902(14) and (18).

[21] Declaration of Marc P. Miles in support of the Claimant's Motion to Withdraw Claims Without Prejudice, at ¶ 8.

with full information). Prohibitions on champerty prohibit such sales,[22] so a market value must be estimated. This requires evidence of what the provable damages are, discounted for litigation risk, net of fees and costs. Surely the Claimant's lawyers have done a more sophisticated litigation risk analysis for the Claimant to consider in deciding whether to withdraw the claim. If they have not, they need to. The result of that analysis should be included with the request to withdraw. The sparse facts offered with the motion fail to support a finding that the withdrawal requested is in the children's best interest. I would permit the Claimant to supplement the motion with the necessary showing if it did not also fail the proper purpose test.

5. Proper purpose

a) Withdrawals Permitted as a Matter of Law

"Proper purpose" is nowhere defined in 20 C.F.R. § 702.225; the materials published in the Federal Register when it was adopted throw no light on its meaning. 38 Fed. Reg. 26861 (Sept. 26, 1973). Without guidance from the regulation itself, decisions of the Benefits Review Board mark out some proper and improper purposes. For example, it is proper to withdraw a claim that lacks merit, *Gutierrez v. Metropolitan Stevedore Co.,* 18 BRBS 62, 64 & n.4 (1986), but improper to withdraw a claim to evade the review of settlements that § 8(i) of the Longshore Act requires. *Jennings v. Lockheed Shipbuilding & Const. Co*., 9 BRBS 212, 214 (1978).

This is not a situation where the Claimant has a choice between two worker's compensation benefit plans, one under state law and other under the Defense Base Act extension of the Longshore Act. American worker's compensation programs share common elements — workers receive the benefit of quicker, more certain wage replacement payments for work-related injuries without the need to prove negligence before juries in general jurisdiction trial courts, while employers obtain definite and lower limits on potential liability than common-law tort actions give. *See generally*, *Potomac Elec. Power Co. v. Director, O.W.C.P.*, 449 U.S. 268, 281 (1980). The Longshore Act supplements but does not supplant complementary state workers' compensation laws. *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. 715 (1980). It makes sense to treat state and federal benefits programs as equivalent as a matter of law, as the Benefits Review Board did in *Stevens v. Matson Terminals*, 32 BRBS 198 (1998) (permitting a withdrawal for the worker to pursue California workers' compensation benefits). The implicit assumption is that recovery is equally likely (although perhaps not certain) under either one. Nuances in the benefits available lead individual workers to prefer one program over another. 9 Larson's Workers' Compensation Law § 145.07[2] (2005) (providing examples of situations where state benefits are preferable to those under the Longshore Act).

I do not read *Stevens* in the broad way the Claimant does, to authorize withdrawals as a matter of law whenever done to pursue some cause of action in state courts of general jurisdiction. That interpretation truncates the "proper purpose" inquiry. I reject the suggestion that withdrawing the death benefits claim to pursue the wrongful death cause of action in North Carolina courts is permissible as a matter of law, with no further analysis of the facts.

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[22] *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d 121, 789 N.E.2d 217, 2003-Ohio-2721 (2003).

b) Facts Bearing on Proper Purpose

Withdrawing the claim to pursue a potentially more lucrative recovery is not inherently improper. Whether that withdrawal would impair the overall compensation scheme or prejudice the Employer or Carrier are relevant considerations too. This is not inconsistent with the other prong of the rule, that focuses single-mindedly on the Claimant's best interest. The "proper purpose" prong inquires more broadly. Withdrawals meant to skirt the review of § 8(i) settlements are rejected for reasons that have nothing to do with a claimant's financial advantage.

(1) Delay in Filing the Withdrawal

The Claimant delayed filing the withdrawal motion until she had received more than $100,000 on the children's' behalf over two years. The larger the amount paid out, the greater the prejudice to the Carrier if it is not reimbursed under the War Hazards Compensation Act. A withdrawal at an early stage of litigation, before much discovery or motion practice has taken place, and limited private and judicial resources have been devoted to a proceeding, is indicative of a proper request. Here discovery has progressed and the Respondents have filed a dispositive motion. These facts tend to show the withdrawal lacks a proper purpose.

(2) Effort to Avoid an Adverse Ruling

This withdrawal is chronologically related to a letter Claimant's counsel wrote on March 30, 2006 that took issue with a statement in the Order on Employer/Carrier's Motion to Quash, entered on March 23, 2006. The order said that responses to requests for admissions the Claimant solicited had conclusively established that the decedent was performing duties at the time of his death related to a "public work" as the Defense Base Act uses the term. Counsel argued that the ruling "would seemingly dispose of the pending Motion for Summary Decision and the entire case." *Id.,* at pg. 2. Rather than file the response due to the summary disposition motion, the withdrawal was filed.

A voluntary dismissal in the Article III courts is the nearest analog to a withdrawal. Decisions passing on those dismissals can be useful in giving content to the term "proper purpose." This does not mean that Rule 41, Fed. R. Civ. P. displaces any standards found in 20 C.F.R. §702.225. All parts of the regulation apply. An administrative law judges may only approve or reject a withdrawal motion. There is no authority to insist that a withdrawal be with prejudice, something § 702.225(c) prevents, or granted only on conditions, as a U.S. District Judge may under Rule 41(a)(2), Fed. R. Civ. P.

Voluntary dismissals have been denied when a plaintiff hopes to avoid an expected adverse result. *Minnesota Mining and Mfg. Co. v. Barr Laboratories, Inc.,* 289 F.3d 775, 783 (8th Cir. 2002); *Radiant Technology Corp. v. Electrovert USA Corp.,* 122 F.R.D. 201, 203-204 (N.D.Tex.1988); *see also,* 9 Wright & Miller: Federal Prac. & Proc. § 2364 (Supp.). Cast in the regulation's terms, it is improper to withdraw a claim where the Claimant anticipates an adverse ruling on a pending motion for summary disposition.

(3) Prejudice to the Carrier's Reimbursement Rights

The Respondents argue that the withdrawal prejudices the Carrier's right to reimbursement of the benefits it has paid, and the additional amounts due to it under the War Hazards Compensation Act. If a claim paid for a substantial period can be withdrawn easily, with the expectation of refiling if the wrongful death action fails to produce the tens of millions of dollars in damages that Claimant's counsel foresees, employers and carriers have disincentives to pay benefits voluntarily. The incentive suddenly becomes to pay no benefits until a compensation order is in hand. This argument has much to commend it. Adjudicators cannot disregard the collateral and perhaps unintended incentives that a withdrawal in these circumstances creates, to the detriment of the overall functioning of the Defense Base and War Hazards Compensation Act programs as Congress envisaged.

Withdrawing the claim delays the Carrier's reimbursement until state or federal courts in North Carolina decide whether the Defense Base Act provides the exclusive remedy. If one year passes[23] and the wrongful death action fails for reasons that do not permit the Claimant to refile under § 13(d) of the Longshore Act, the Carrier can be left without a way to obtain a compensation order and reimbursement.

It is by no means clear that if the claim is withdrawn, jurisdiction continues to enter an *ex parte* compensation order for the more than $100,000 in benefits the Carrier has paid. That question is not squarely before me, so I cannot answer it authoritatively. The Board permits § 8(f) proceedings to continue after a claimant withdraws a Longshore claim. *Langley v. Kellers' Peoria Harbor Fleeting,* 27 BRBS 140 (1993). But on the issue whether the employer is entitled to relief from the Special Fund, the Director, not the claimant, is the employer's opponent. No opponent would remain here.

The Claimant counters that ultimately the Carrier will obtain reimbursement of the death benefits it has paid in the form of a credit against any wrongful death judgment entered in the Claimant's favor, relying on *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966). That is fine for the Claimant to say, it is not the party that has paid out more than $100,000. The argument assumes success on the wrongful death claim, but no recovery means no set-off. The *Biggs* decision does not specifically include credit for pre-judgment interest on the benefits. The wages at issue in *Biggs* appear to have been comparatively small; the trial court's decision on one of the two claims consolidated in that appeal shows the claimant's entire award in the Industrial Commission of Virginia was $1,627.60 plus $139.00 as medical expenses.[24] Interest may not have loomed large in the court's consideration. The *Biggs* decision implies nothing about how to deal with the 15% additional claims expense or the Carrier's own attorneys fees that are reimbursable to it under the War Hazards Compensation Act regulations.[25] Augmentations of this type were not implicated in the Longshore Act versus Jones Act situation before court. The Claimant has not offered to shoulder that additional liability, or "vouch assurance of a return of the money," as the *Biggs* court put it. *Id*., at 365.

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[23] For the first year following the cessation of the Carrier's voluntary payments, the claim can be refiled. See § 13(a) of the Longshore Act, codified at 33 U.S.C.A. § 913(a).

[24] *Biggs v. Norfolk Dredging Co*., 237 F.Supp 590, 593 (E.D. Va. 1965).

[25] 20 C.F.R. § 61.104(b) & (c).

An important assumption in the *Biggs* decision is inconsistent with today's Longshore Act. The panel's opinion suggests that by giving the compensation agency notice of the other claim (there a Jones Act claim, here the action for wrongful death) no delay occurs in the payment of compensation benefits, because the time and amount of their payment is a decision "entrusted to the administrative agency, not the employer." *Biggs*, 360 F.2d at 365. The Longshore Act assumes payments by the carrier typically will be voluntary, not withheld until coerced by an order of an administrative law judge following an APA hearing. When *Biggs* was decided 40 years ago, no APA hearings were possible.

Finally, it is not clear where (if at all) the wrongful death action filed on the Claimant's behalf will proceed. That issue is currently before the U.S. Court of Appeals for the Fourth Circuit. If the matter proceeds in the state courts, *Biggs* represents persuasive, not binding authority. *Biggs* does not finesse the prejudice issue the Carrier presents.

(4) Prejudice to the Employer's Rights

The Employer argues it is entitled to a ruling in this forum about whether the Defense Base Act is the Claimant's exclusive remedy. That issue isn't going away, but it is most appropriately addressed in the pending motion for summary disposition, not this withdrawal request. I have already found that the attempt to avoid an anticipated adverse ruling is an improper purpose for a withdrawal.

(5) Other Issues

I will not address the Claimant's arguments based on the Benefit Review Board's decision in *Lewis v. SSA Gulf Terminals, Inc.,* No. 03-0533 (BRB April 22, 2004). The Board's unpublished decisions lack precedential value; parties generally may not cite or rely on them. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). *See also,* the similar limitation found in Ninth Circuit Rule 36-3.

c) Summary of Facts Bearing on Proper Purpose

This withdrawal interferes with the efficient operation of the War Hazards Compensation Act, by creating a disincentive for employers and carriers to pay death benefits promptly, before a compensation order is entered by an administrative law judge. It prejudices the Carrier by blocking speedy reimbursement of the death benefit payments, and calls into doubt the reimbursement of its interest and claims expenses that the regulations allow. It seeks to avoid an adverse ruling the Claimant anticipates on the pending motion for summary disposition, something the Article III courts do not countenance. The withdrawal lacks a proper purpose.

Order

I find that (1) the Claimant has not shown the request to withdraw this Defense Base Act claim is in the best interest of the minor children and (2) under the specific facts of this case, the withdrawal lacks a proper purpose. The request is denied.

The Claimant shall file a response to the motion for summary determination within five days.

So Ordered.

A

William Dorsey
Administrative Law Judge